Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FREDDIE CAMACHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One:

Whether, Constitutional Due Process requires a heightened standard of proof of sentencing determinations which bear significantly on the severity of the sentence?

Question Two:

Whether Constitutional Due Process prohibits a person from being sentenced for an offense not pled or proved by the Government?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Freddie Camacho, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, dated February 1, 1999, is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered February 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

I. Introduction

This case involves the issue of whether relevant conduct, under the sentencing guidelines that dramatically increases the sentence of a defendant must be proved by

some heightened standard of proof such as clear and convincing evidence or merely by a preponderance of the evidence.

There is also the issue of whether it is a violation of Due Process for a person to be sentenced under a statute for which he neither was indicted, tried or convicted.

The evidence presented at trial showed that on July 17, 1997 an individual named Hector Salinas was abducted from his place of business in McAllen, Texas by Freddie Camacho and several other individuals. There was testimony that Hector Salinas had been involved in a drug transaction and was scheduled to serve as a witness for the Government in the drug trial of several individuals.

The indictment under which Mr. Camacho was tried did not allege that Mr. Camacho or any co-defendant caused the death of any individual or that any victim suffered bodily injury or that the kidnaping was related to a drug transaction. There were no jury findings on these issues.

After conviction, the sentencing Court over the objections of Mr. Camacho, applied the cross-reference provision of the sentence guideline for kidnaping 2A4.1(c) and sentenced him under Section 2A1.1, (first degree murder) to life imprisonment. This was based on information produced at the sentencing proceedings regarding the manner of death of the victim, subsequent to his abduction.

II. Proceeding Below

On February 24, 1998, Freddie Camacho was convicted by a jury of kidnaping in the United States District Court for the Southern District of Texas, McAllen Division. A judgment was entered by the Honorable Ricardo H. Hinojosa on May 20, 1998, sentencing him to life imprisonment.

The case was appealed and the United States Court of Appeals affirmed the conviction and sentence in an opinion issued February 1, 1999.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case because the United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter.

ARGUMENT UNDER QUESTION ONE

In this case Mr. Camacho was convicted of the federal offense of kidnaping. (18 U.S.C. 1201). The applicable sentencing guideline base offense level for kidnaping is 24. (2A4.1(a)). The guideline for this offense also has a cross-reference provision (2A4.1(c)) which can subject a defendant to level 43, a mandatory life sentence. The District Court applied this cross-reference provision in sentencing Mr. Camacho.

Once the Court applied the cross-reference provision by finding by a preponderance of the evidence that the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111, it had no choice but to give Mr. Camacho a life sentence. It has been stated that:

> "while the products of the sentencing commissions' labor have been given the modest name 'Guidelines' . . . they have the force and effect of laws, prescribing the sentence criminal defendants are to receive. A judge who disregards them will be reversed." *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

The effect of the sentencing Court finding that the cross-reference applied was to require a mandatory life sentence. The Court did so without affording Mr. Camacho the requisite protections afforded all individuals by the criminal justice system.

The application of this cross-reference and the finding that it applied had a dramatic increase in the sentence of Mr. Camacho. It mandated a life sentence.

The Court of Appeals in affirming this case noted in its opinion case that Mr. Camacho was sentenced under this cross-reference provision and that all that was required is that proof of such factor be by a preponderance of the evidence. The question then becomes whether deciding this issue by a preponderance of the evidence standard was proper.

In the case of *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), this Court stated:

> "we acknowledge a divergence of opinion among the circuits as to whether in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence."

This Court again in *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), recognized that some heightened standard of proof might apply to sentencing determinations which bears significantly on the severity of the sentence. It recognized the divergence of opinion among the circuits but it did not resolve the issue.

The jump from a level 24 to a mandatory life sentence is the type of enormous sentence enhancement, wherein fundamental due process mandates proof of such an enhancement factor by at least clear and convincing evidence.

In a case that involved issues similar to the facts in this case, the Court of Appeals for the First Circuit held that the effect of giving the defendant a life sentence was:

> "to permit the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was at sentencing, at best a shadow of the usual procedural protections, such as the requirement of proof beyond a reasonable doubt." *United States v. Lombard*, 72 F.3d 170 (CA1, 1995).

Mr. Camacho submits that it is a violation of fundemental due process for a sentencing Court to decide such an important fact by a preponderance of the evidence.

ARGUMENT UNDER QUESTION TWO

The applications of the cross-reference provision and the application of section 2A1.1, mandates that the sentencing Court sentence the defendant to a life term without requiring the Government to plead and prove that the defendant committed first degree murder.

It has long been established that the Constitution's Due Process Clause:

> "protects the accused against convictons except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with he is charged", *In re Winship*, 397 U.S. 357, 364, 90 S. Ct. 1068 (1970).

Mr. Camacho was charged by indictment that he:

> "did knowingly and unlawfully seize, confine, kidnap, carry away, Hector Salinas, and did willfully transport Hector Salinas in foreign commerce from the United States of America into the Republic of Mexico, for reward and benefit."

There was no notice to Mr. Camacho in the indictment that the Government was alleging that Mr. Camacho was responsible for the death of the victim of the kidnaping.

It was at the sentencing when the Court took this matter into consideration and made a determination that Mr. Camacho should be given a life sentence because it found by preponderance of the evidence that the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111.

The net result of the proceedings is that Mr. Camacho was tried for kidnaping but sentenced for murder. This Court in *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), has stated that if the statutory provision under which a person is sentenced constitutes a separate crime from that for which he is convicted, the Government must have pled and proved such provision. *Jones v. United States*, No. 97-6203, (Supreme Court decided, March 24, 1999).

The Government did not have to bother with pleading and proving beyond a reasonable doubt that Mr. Camacho was responsible for the death of the victim to obtain a life sentence against him. It merely had to get the trial Court to find, by a preponderance of the evidence, that the victim was killed under circumstances that would constitute murder to obtain the same result. This goes to the very heart of the due process argument that a person cannot be convicted and punished for an offense unless every element of the offense is proved beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES OF AMERICA,	§	**CRIMINAL NO. M-97-272-S1**
PLAINTIFF,	§	
v.	§	
FREDDIE CAMACHO,	§	
DEFENDANT,	§	

SUPERSEDING INDICTMENT

(Filed Febr. 4, 1998)

THE GRAND JURY CHARGES:

Count One

On or about July 17, 1997, in the Southern District of Texas and within the jurisdiction of the Court, defendant

FREDDIE CAMACHO

did knowingly and unlawfully seize, confine, kidnap, carry away, Hector Salinas, and did wilfully transport Hector Salinas in foreign commerce from the United States of America into the Republic of Mexico, for reward and benefit.

[Violation of Title 18, United States Code, Sections 1201(a)(1) and 2]

A TRUE BILL

/s/ Illegible
FOREPERSON

Foreperson

/s/ Jay L. Leonard
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-40628
Summary Calender

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FREDDIE CAMACHO,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
USDC No. M-97-CR-272-2

(Filed Febr. 1, 1999)

Before WISDOM, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

A jury convicted Freddie Camacho of kidnaping, in violation of 18 U.S.C. § 1201(a). The district court sentenced Camacho to life imprisonment and to five years of supervised release. Camacho timely filed this appeal, in which he makes several assignments of error. None of Camacho's contentions has merit. We affirm.

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

First, Camacho contends that the district court violated his due process rights by sentencing him for an offense, murder, which the Government had not pleaded and had not proved. The district court sentenced Camacho under U.S.S.G. § 2A4.1(c), which cross-referenced the sentencing guideline for murder.[1] Because Camacho raises this claim for the first time on appeal, he must show that the district court committed plain error.[2] When a defendant is charged with and convicted of an offense, "the sentencing court may nevertheless consider the relevant but uncharged conduct as long as the punishment selected is within the statutory range for the offense of conviction."[3] The kidnaping statute under with Camacho was convicted, 18 U.S.C. § 1201, prescribes punishment of death or life imprisonment "if the death of any person results" from the kidnaping.[4] Accordingly, Camacho cannot show error, plain or otherwise.

Second, Camacho argues that the district court violated his due process rights by applying enhancement provisions U.S.S.G. § 2A4.1(b)(2)(A) and (b)(7) to enhance his offense level, when the Government did not plead the

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[1] Camacho was sentenced under the following cross-reference provision: "If the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing take place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder)." U.S.S.G. § 2A4.1(c)(1).

[2] *See United States v. Calverley*, 37 F.3d 160, 162-163 (5th Cir. 1994) (en banc).

[3] *See United States v. McCaskey*, 9 F.3d 368, 377 (5th Cir. 1993).

[4] *See* 18 U.S.C. § 1201(a).

conduct underlying those enhancements in the indictment and the jury made no findings that conduct.[5] Because Camacho also raises this contention for the first time on appeal, the plain error standard again applies.[6] Camacho's contention is without merit. The district court ultimately did not sentence Camacho under these enhancement provisions because it applied the aforementioned cross-reference provision. Moreover, sentencing factors need not be proved beyond a reasonable doubt, but only by a preponderance of the evidence.[7] Again, Camacho has not shown error, plain or otherwise.

Third, Camacho argues the evidence offered at sentencing was insufficient to establish that he should be held responsible for the later murder of the kidnaping victim. He also maintains that the evidence did not clearly establish that the victim's death in fact resulted from murder. Under the relevant-conduct guideline, U.S.S.G. § 1B1.3 (a)(1)(B), a defendant is liable for "all reasonably foreseeable acts and omissions of others in furtherance of . . . jointly undertaken criminal activity."[8] "Jointly undertaken criminal activity" is "a criminal plan,

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[5] The district court stated that Camacho's base offense level should be enhanced by four levels because the victim sustained "permanent . . . injury," under § 2A4.1(b)(2)(A), and by additional levels because the kidnaping was committed in connection with a drug offense, under § 2A4.(b)(7).

[6] *See Calverley*, 37 F.3d at 162-63

[7] *See United States v. Castro*, 889 F.2d 562, 569-70 (5th Cir. 1989).

[8] *United States v. Hull*, 160 F.3d 265, 268-69 (5th Cir. 1988) (quoting U.S.S.G § 1B1.3(a)(1)(B)).

scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy."[9] "Each of these determinations ('reasonable foreseeability,' 'in furtherance,' and the existence of 'jointly undertaken criminal activity') is factual and therefore is reviewed under the clearly erroneous standard."[10] Our review of the circumstances of the instant kidnaping leads us to the escapable conclusion that the district court did not clearly err by determining that the evidence showed both that a murder occurred and that the murder was reasonably foreseeable to Camacho.

Finally, Camacho maintains that his trial counsel performed ineffectively by failing to object to testimony by a Government witness at trial that Camacho had engaged in other violent criminal acts. Generally, ineffective assistance of counsel claims may not be litigated on direct appeal unless they are adequately raised and addressed in the district court.[11] We will address only the merits of such a claim on direct appeal in rare cases where the record allows the court to evaluate fairly the merits of the claim.[12] Camacho's ineffectiveness claim was neither raised nor addressed in district court, and the record is inadequate to permit us to address the claim.

AFFIRMED.

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[9] *Id.*

[10] *Id.*

[11] *United States v. Rivas*, 157 F.3d 364, 369 (5th Cir. 1998).

[12] *Id.* (quotation and citation omitted).